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US Airways, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Don Addington, *et al.*, on behalf of
themselves and all similarly situated
former America West Pilots,

Plaintiffs,

vs.

US Airline Pilots Ass'n, an
unincorporated association,

Defendant,

US Airways, Inc.,

Intervenor.

Case No. 2:13-cv-00471-ROS

**US AIRWAYS, INC.'S MOTION FOR
LIMITED INTERVENTION UNDER
RULE 24 OF THE FEDERAL RULES
OF CIVIL PROCEDURE**

US Airways, Inc. (“US Airways”), by and through its undersigned counsel, hereby files this motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. This motion is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

In prior briefing to this Court on its motion to dismiss plaintiffs’ breach-of-contract claim (Count Two), US Airways explained that: “US Airways has a significant interest in the prompt and final resolution of the merits of plaintiffs’ DFR claim against USAPA. It therefore intends to file a motion for limited intervention under Rule 24 of the Federal Rules of Civil Procedure if and when its motion to dismiss is granted.” (US Airways’ Reply In Support Of Motion To Dismiss (Doc. No. 54), at p. 3 n.2 (p. 4 of ECF filing).) On July 19, 2013, the Court granted US Airways’ motion to dismiss. (Order (Doc. No. 122), at pp. 6:18-7:1.) In accordance with Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure, US Airways thus moves for intervention in this lawsuit for the limited purposes of protecting its interest in:

- (i) a prompt resolution of the merits of the West Pilots’ claim against defendant US Airline Pilots Association (“USAPA”) for breach of the duty of fair representation (“DFR”) – including ensuring that US Airways has the right to participate in potential additional district court and appellate proceedings with regard to the ripeness of the West Pilots’ claim; and
- (ii) a prompt determination that the West Pilots have the right under the federal McCaskill-Bond statute to full and separate representation in the upcoming seniority-integration proceedings between the pilots employed by US Airways and American Airlines, Inc. (“American”) – contrary to the position that USAPA has recently taken in this litigation.

The requested intervention is necessary to protect US Airways’ significant interest in achieving a seniority integration of the US Airways and American pilots in accordance with the schedule prescribed in the Memorandum of Understanding (“MOU”) that was executed in connection with the US Airways/American merger by US Airways,

1 American, USAPA representing the US Airways pilots, and the Allied Pilots Association
2 representing the American pilots. Under the MOU, the US Airways/American seniority-
3 integration process is scheduled to begin “as soon as possible” after the close of the
4 merger transaction, which is currently anticipated to occur during the third quarter of this
5 year.

6 Because the plaintiffs’ DFR claim against USAPA implicates how USAPA may
7 proceed under the terms of the MOU (i.e., whether it must use the Nicolau Award as the
8 sole basis for determining the relative seniority ordering of East and West Pilots), and
9 because the plaintiffs’ McCaskill-Bond declaratory-relief claim (set forth in their
10 proposed First Amended Complaint) implicates how all of the parties may proceed vis-à-
11 vis the West Pilots, a failure to promptly resolve the merits of these claims would threaten
12 to disrupt and delay the process of integrating US Airways and American pilots following
13 the merger. That process is central to the airline’s realization of the operational and
14 financial benefits from the combined pilot workforce that is contemplated by the MOU
15 and the merger. Accordingly, while US Airways has been and still is neutral regarding
16 the merits of the underlying DFR claim between USAPA and the West Pilots, it has a
17 significant protectable interest in seeing that the plaintiffs’ claims against USAPA are
18 resolved promptly and on the merits and, with respect to the McCaskill-Bond issue, a
19 significant interest in confirming its legal position that its obligation under McCaskill-
20 Bond to provide for a “fair and equitable” seniority integration entails affording an
21 opportunity for full and separate participation by the West Pilots under the circumstances
22 of this case.

23 US Airways therefore respectfully seeks intervention as of right under Rule 24(a)
24 or, alternatively, permissive intervention under Rule 24(b).¹

25
26 ¹ Rule 24(c) provides that a motion for intervention shall be accompanied by a “pleading
27 that sets out the claim or defense for which intervention is sought.” Attached hereto is
28 US Airways’ Intervention Pleading, which sets forth the grounds for US Airways’ requested
intervention, including the “claim . . . for which intervention is sought” within the meaning of the
case law applying Rule 24(b)(1)(B).

FACTUAL AND PROCEDURAL BACKGROUND

In order to avoid unnecessary repetition, US Airways refers the Court to its “Intervention Pleading Pursuant To Rule 24 Of The Federal Rules Of Civil Procedure” filed concurrently herewith and incorporates by reference the material contained therein (in particular, ¶¶ 1-7).

ARGUMENT

I. US AIRWAYS SATISFIES ALL OF THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT UNDER RULE 24(a).

Intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure should be granted where: (a) the movant has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the movant’s ability to protect its interest; (3) the motion to intervene is timely; and (4) the existing parties may not adequately represent the movant’s interest. *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). In evaluating these requirements, “courts are guided primarily by practical and equitable considerations [and] construe the Rule broadly in favor of proposed intervenors.” *Id.*

A. US Airways’ Interest In Ensuring That The US Airways/American Pilots Seniority Integration Takes Place According To The Schedule Prescribed In The MOU And In Accordance With Its Obligations Under McCaskill-Bond, So That That There Is No Delay In The Realization Of The Operational And Financial Benefits From A Combined Pilot Workforce, Is A Significant Protectable Interest.

“Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.” *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). As the Ninth Circuit has explained:

By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views

1 before the court. *City of Los Angeles*, 288 F.3d at 398
2 (emphasis in original).

3 The MOU, to which US Airways is a party, contains a schedule for the initiation
4 and completion of the seniority-integration process between the US Airways (East and
5 West) pilots and the American pilots. (*See, e.g.*, US Airways, Inc.’s Intervention Pleading
6 Pursuant To Rule 24 Of The Federal Rules Of Civil Procedure (“Intervention Pleading”),
7 filed concurrently herewith, ¶ 2.) Compliance with an agreement to which a proposed
8 intervenor is a party constitutes a significant protectable interest. *See City of Los Angeles*,
9 288 F.3d at 400 (finding that police union had protectable interest where proposed
10 resolution to litigation, namely, a consent decree between the parties, potentially
11 conflicted with terms of union’s collective bargaining agreement); *EEOC v. AT&T*,
12 506 F.2d 735, 741-42 (3rd Cir. 1974) (intervention appropriate where contractual rights of
13 movant may be affected).

14 Here, plaintiffs seek an injunction requiring USAPA “to conduct seniority
15 integration according to the MOU procedures but using the seniority order in the Nicolau
16 Award list to order the US Airways pilots.” (FAC ¶ 136; Doc. No. 124 Ex. 2; Compl.
17 ¶ 123.) They also seek a declaratory judgment against USAPA that the West Pilots have
18 the right under McCaskill-Bond to full and separate representation (with counsel of their
19 own choosing) in the seniority-integration negotiation/arbitration proceedings with the
20 American pilots. (*See* FAC ¶ 137.) Because the plaintiffs’ DFR claim implicates how
21 USAPA may proceed under the terms of the MOU, and because their McCaskill-Bond
22 declaratory-relief claim implicates how all of the parties may proceed vis-à-vis the West
23 Pilots, a failure to promptly resolve the merits of these claims would threaten to disrupt
24 and delay the process of integrating US Airways and American pilots following the
25 merger – a process that is central to the airline’s realization of the operational and
26 financial benefits from the combined pilot workforce that is contemplated by the MOU
27 and the merger. Accordingly, while US Airways has been and still is neutral regarding
28 the merits of the underlying DFR claim between USAPA and the West Pilots, it has a

1 significant protectable interest in seeing that the plaintiffs' claims against USAPA are
2 resolved promptly and on the merits.

3 The Court's July 19, 2013 ruling that plaintiffs' DFR claim against USAPA is ripe,
4 and its scheduling of a September 24, 2013 trial on the merits of that claim (consolidated
5 with the hearing on plaintiffs' motion for preliminary injunction), are consistent with
6 US Airways' interest as described above. But US Airways still has a strong and
7 continuing interest in ensuring that the remaining proceedings before this Court are
8 conducted in a manner that promotes a prompt resolution of the merits of the West Pilots'
9 claims. With respect to the dispute regarding the West Pilots' role in the McCaskill-Bond
10 process, which was not addressed in the Court's July 19 Order, US Airways has a
11 significant protectable interest in a prompt resolution as well as confirmation of its legal
12 position (disputed by USAPA) that its obligation under McCaskill-Bond to provide for a
13 "fair and equitable" seniority integration entails affording an opportunity to the West
14 Pilots to have a "separate seat at the table" under the circumstances of this case. *Cf. Smith*
15 *v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1980) ("In appropriate circumstances,
16 therefore, *stare decisis* may supply the requisite practical impairment warranting
17 intervention of right.").

18 As to plaintiffs' DFR claim, USAPA continues to assert that the West Pilots' claim
19 is not ripe notwithstanding the Court's July 19 ruling to the contrary. (*See Answer Of US*
20 *Airline Pilots Association* (Doc. No. 123), at p. 15:3-4 (asserting, as second affirmative
21 defense, that "The Complaint does not present a claim that is ripe for adjudication.").)
22 Additionally, US Airways has a strong interest in being a party in this case so that, unlike
23 in *Addington I, Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), it
24 may participate in any future proceedings before the Ninth Circuit – especially with
25 regard to the ripeness of the West Pilots' DFR claim against USAPA.

26 US Airways seeks to intervene only for the limited purposes of protecting the
27 specific interests described herein. It is within the Court's discretion to "limit intervention
28 to particular issues" or to allow intervention for "a limited purpose." *Dep't of Fair Empl.*

1 & *Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (court has “discretion to
 2 limit intervention to particular issues”); *In re NSA Telcoms. Records Litig.*, 2007 U.S.
 3 Dist. LEXIS 14473, at *41-42 (N.D. Cal. Feb. 20, 2007) (court may grant intervention for
 4 “a limited purpose”); *Harris v. Pernsley*, 820 F.2d 592, 599 (3rd Cir. 1987) (movant for
 5 intervention “may have a sufficient interest to intervene as to certain issues in an action
 6 without having an interest in the litigation as a whole”).

7 **B. The Disposition Of This Action May, As A Practical Matter, Impair Or**
 8 **Impede US Airways’ Ability To Protect Its Interests.**

9 In determining whether an interest may be impaired or impeded, courts have been
 10 guided by the Advisory Committee’s notes on Rule 24, which provide that “if an absentee
 11 would be substantially affected in a practical sense by the determination made in an
 12 action, he should, as a general rule, be entitled to intervene.” *Sw. Ctr. for Biological*
 13 *Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting from Fed. R. Civ. P. 24
 14 advisory committee’s notes); *see also City of Los Angeles*, 288 F.3d at 401 (“the relevant
 15 inquiry is whether the [disposition of the action] ‘may’ impair rights ‘as a practical
 16 matter,’” and not whether it “will ‘necessarily’ impair them”) (citation omitted).

17 US Airways may be substantially affected if this action does not promptly generate
 18 a disposition on the merits of plaintiffs’ claims against USAPA and/or if the West Pilots’
 19 role in the McCaskill-Bond process is adjudicated without US Airways’ participation. *See*
 20 *Smith*, 651 F.2d at 1325. As noted in Section I.A, *supra*, the plaintiffs’ claims against
 21 USAPA implicate how the parties may proceed, and, as a result, a failure to promptly
 22 resolve the merits of those claims or a resolution that results in additional legal challenges
 23 would threaten to disrupt and delay the process of integrating US Airways and American
 24 pilots. That is a process which is central to the airline’s realization of the operational and
 25 financial benefits from the combined pilot workforce that is contemplated by the merger.

26 **C. US Airways’ Motion Is Timely.**

27 US Airways filed this motion soon after the Court’s July 19 decision on its motion
 28 to dismiss and the plaintiffs’ July 25 motion for leave to file a first amended complaint – a

1 proposed pleading which, except for purposes of preserving plaintiffs' rights on appeal,
2 does not assert any claims against US Airways. (*See* Doc. No. 124, at p. 3:8-16.) Those
3 two events rendered US Airways a non-party and thus eligible to intervene. US Airways'
4 intervention at this stage of the lawsuit will not cause prejudice to plaintiffs or to USAPA.
5 This motion is timely.

6 **D. Plaintiffs And USAPA May Not Adequately Represent US Airways'**
7 **Interests.**

8 Only a "minimal showing" is required to demonstrate that representation of the
9 proposed intervenor's interest by the existing parties "may" be inadequate. *City of Los*
10 *Angeles*, 288 F.3d at 402. The most important consideration "is how the interest [of the
11 proposed intervenor] compares with the interests of existing parties." *Arakaki v.*
12 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). In this case, plaintiffs' and USAPA's
13 interests lie fundamentally in successfully prosecuting or successfully defending the West
14 Pilots' DFR and McCaskill-Bond declaratory-relief claims, regardless of how the
15 litigation of those claims ultimately might affect the timing of the seniority-integration
16 process between the US Airways and American pilots.

17 Plaintiffs have made clear their desire to obtain a prompt adjudication of the merits
18 of their claims against USAPA, so that there is no interference with the process for the
19 US Airways/American pilots seniority integration. But, separate and apart from the West
20 Pilots' interests that will be advocated by plaintiffs, US Airways has a significant interest
21 in its own behalf to be allowed to start and complete the seniority-integration process on a
22 timely basis given that any interference with that process could have an adverse impact on
23 the operational and financial benefits of the merger with American. USAPA's actions in
24 this litigation have been, and still are, inconsistent with a prompt resolution on the merits
25 of plaintiffs' claims. Indeed, notwithstanding the Court's July 19 decision, USAPA still
26 asserts that the West Pilots' DFR claim is not ripe. (*See Answer Of US Airline Pilots*
27 *Association* (Doc. No. 123), at p. 15:3-4.)
28

Because US Airways' interests differ from the interests of both plaintiffs and USAPA, its interests may not be adequately represented by the parties and, accordingly, US Airways satisfies the "minimal showing" necessary to satisfy the final requirement for intervention as of right under Rule 24(a).

II. US AIRWAYS SATISFIES ALL OF THE REQUIREMENTS FOR PERMISSIVE INTERVENTION UNDER RULE 24(b).

If this Court were to conclude that US Airways is not entitled to intervene as of right under Rule 24(a), US Airways should nonetheless be permitted to intervene under Rule 24(b). Permissive intervention under Rule 24(b) should be granted where: (1) the motion is timely; and (2) the proposed intervenor has a claim or defense, within the meaning of Rule 24(b), that shares a common question of law or fact with the main action. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843-44 (9th Cir. 2011).² The court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

A. US Airways' Motion Is Timely.

As demonstrated in Section I.C, *supra*, US Airways' motion is timely.

B. US Airways Has A Claim Or Defense, Within The Meaning Of Rule 24(b), That Shares A Common Question Of Law Or Fact With This Action.

Although the plain language of Rule 24(b)(1)(B) refers to an intervenor with "a *claim or defense* that shares with the main action a common question of law or fact" (emphasis added), this requirement is not strictly enforced. Rather, "[w]hether there is a common question of law or fact is liberally construed by the courts," *S. Yuba River*

² Although a proposed intervenor sometimes must also establish an independent ground for subject-matter jurisdiction, "[w]here the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Freedom from Religion Found., Inc.*, 644 F.3d at 844. Because this Court has original federal-question jurisdiction over plaintiffs' DFR claim against USAPA and because US Airways does not seek to assert any new cause of action (i.e., its request for a determination of the West Pilots' rights under McCaskill-Bond is already the subject of plaintiffs' previously-filed motion for leave to file a First Amended Complaint), US Airways need not demonstrate an independent ground for this Court's jurisdiction in order to be permitted to intervene under Rule 24(b).

1 *Citizens League v. Nat'l Marine Fisheries Serv.*, 2007 U.S. Dist. LEXIS 81636, *42
 2 (E.D. Cal. Oct. 16, 2007), and courts frequently grant permissive intervention even though
 3 the intervenor does not have a free-standing claim or defense. *See, e.g., Brooks v. Flagg*
 4 *Bros., Inc.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) (“the words ‘claim or defense’ have not
 5 been read in a technical sense [and] permissive intervention has been upheld even
 6 where . . . the existence of any nominate ‘claim’ or ‘defense’ is difficult to find”);
 7 *Wilderness Soc’y v. Wisely*, 524 F. Supp. 2d 1285, 1294 (D. Colo. 2007) (permissive
 8 intervention granted where, “[r]egardless of how they may be conceived and described,
 9 [movant] possesses interests in leases, . . . and matters relating to the legality of the
 10 decision . . . that resulted in the sale of those leases clearly share common questions of law
 11 and fact with Plaintiffs’ claims”). It is sufficient for a proposed intervenor to show that it
 12 is “directly affected” by the parties’ lawsuit. *See S. Yuba River Citizens League*,
 13 2007 U.S. Dist. LEXIS 81636, at *43 (allowing permissive intervention where movant
 14 had an interest in enforcing the environmental opinion that was contested in the lawsuit
 15 and thus was “directly affected” by the dispute, thereby establishing “common issues of
 16 fact”).

17 As discussed in Sections I.A and I.B, *supra*, US Airways has a significant interest
 18 in ensuring that the McCaskill-Bond seniority-integration process may proceed in
 19 accordance with the time frame in the MOU. This interest shares common questions of
 20 law and fact with plaintiffs’ claims against USAPA. US Airways may thus be directly
 21 affected by this litigation in a manner that is sufficient to warrant permissive intervention.

22 Moreover, to the extent the Court determines in its discretion that an actual “claim”
 23 is necessary for permissive intervention, US Airways’ Intervention Pleading attached
 24 hereto (in particular, ¶¶ 11-14) sets forth a claim for declaratory judgment against USAPA
 25 to the effect that the West Pilots have the right to full and separate representation under
 26 McCaskill-Bond in the US Airways/American pilot seniority-integration process.

1 Dated: July 30, 2013.

O'Melveny & Myers LLP

2 By: /s/ Robert A. Siegel

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2013, I caused to be electronically transmitted the attached Defendant US Airways, Inc.'s Motion For Limited Intervention Under Rule 24 Of The Federal Rules Of Civil Procedure (with attachment) to the Clerk's office using the CM/ECF System for filing.

/s/ Robert A. Siegel

Robert A. Siegel

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